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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 616

McALLISTER LIGHTERAGE LINE, INC.,
Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTER-STATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

MAURICE A. KRISEL,
ROMAN BECK,
Counsel for Appellant.

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DISTRICT COURT OF THE UNITED STATES,
SOUTHERN DISTRICT OF NEW YORK

Civil Number 27,352

Statement re Jurisdiction

McALLISTER LIGHTERAGE LINE, INC.,
Petitioner,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Defendants

STATEMENT OF PETITIONER, McALLISTER LIGHTERAGE LINE, INC., AS TO JURISDICTION, PURSUANT TO RULE 12 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES.

The petitioner, McAllister Lighterage Line, Inc., appellant, having presented this day its petition for appeal now files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final decree and judgment rendered against petitioner in the above-entitled proceeding by the District Court of the United States for the Southern District of New York, on August 9, 1945, and should exercise such jurisdiction in this case.

The Statutory Provision Believed to Sustain the Jurisdiction

This appeal is prosecuted from a final judgment and decree which dismisses, for want of equity, the petition of McAllister Lighterage Line, Inc. (herein called petitioner) to enjoin, set aside, and annul orders of the Interstate Commerce Commission entered on July 28, 1942, and February 7, 1944, in proceedings before that Commission designated on its records as Docket Numbers W-81 and W-217, wherein the Commission denied an application by petitioner under Section 309(a) of Part III of the Interstate Commerce Act for a certificate to engage in transportation of general commodities by water as a common carrier for hire over certain specified routes and between certain ports, in interstate commerce, and which final decree and judgment adjudges that the aforesaid orders of the Commission are in all respects valid.

The final decree and judgment here appealed from was entered in the District Court of the United States for the Southern District of New York, on August 9, 1945, by a statutory court consisting of one Circuit and two District judges specially convoked under and by virtue of the provisions of the Urgent Deficiencies Act, 38 Stat. 220, Title 28 U. S. C., Section 47.

Section 210 of the Judicial Code (28 U. S. C., Section 47a) provides, in part, that,

> "A final judgment or decree of the district court in cases specified in Section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, * * *."

It is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the

final judgment and decree before mentioned by virtue of the express statutory provisions just quoted.

The Statute Involved

Section 309(a) of Part III of the Interstate Commerce Act (49 U. S. C., section 909) is here involved. The pertinent provisions of that section are as follows:

> "(a) Except as otherwise provided in this section and section 311, no common carrier by water shall engage in transportation subject to this part unless it holds a certificate of public convenience and necessity issued by the Commission: *Provided, however,* That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by water on January 1, 1940, over the route or routes or between ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in subsection (b) of this section and prior to the expiration of one hundred and twenty days after this section takes effect."

The Date of the Final Judgment and Decree Sought to Be Reviewed, and the Date upon Which the Application for Appeal Is Presented.

The final decree and judgment here sought to be reviewed was entered in the Judgment Book of the United States District Court for the Southern District of New York, on August 9, 1945.

The petition for appeal herein was presented and filed on October 8, 1945.

Statement

After the usual proceedings before the Interstate Commerce Commission, including a hearing before an Examiner, an Examiner's Report, exceptions to that report, a Report and Order of Division "4," denying the application, and an order of the full Commission sustaining that denial, the orders of the Commission were made, which were in all respects sustained by the statutory court in the final decree and order here sought to be reviewed.

The Commission's orders, which the District Court upheld, denied an application by petitioner under Section 309(a) of Part III of the Interstate Commerce Act for a certificate to engage in transportation of general commodities by water as a common carrier for hire over certain specified routes and between certain ports, in interstate commerce. The Report of the Commission, on reconsideration, Division "4," sheets 3 and 4, contains the following findings concerning the nature and history of petitioner's business:

> "Applicant or its predecessors have been engaged in marine transportation since 1864, and the business has been continuously owned by its founder or his descendants through four generations. The corporate set-up now consists of McAllister Brothers, Inc., which charters all of its equipment to McAllister Lighterage Line, Inc., the operating company. Both companies are mutually controlled. Applicant now owns or charters 101 units of floating equipment, including 16 tugboats ranging from 300 to 1,050 horsepower, 8 lighters, 4 derrick barges, 64 scows, 9 barges, 2 coastal tugs and 2 ocean-going barges of 2,500 tons capacity. The United States Government has requisitioned the 2 coastal tugs but has allocated to applicant 2 diesel-powered tugs to be operated by it as agent for the gov-

ernment; one of these tugs is a coastal type. It is expected that other vessels will also be allocated to applicant under the same arrangement in the near future. At all times applicant has maintained at least one vessel licensed for coastal operations.

"Applicant's activities in the past have included ocean transportation, harbor towing, freighting, salvage, fishing, chartering, passenger excursions and managing or operating for other companies. A general barge and towing service was performed between Cuba, New Orleans, La., and other eastern ports in the period between 1900 and 1914; salvage operations were conducted between New York and Norfolk, Va., with trawlers in 1920, and a steamship was purchased in 1922 for ocean trading. In the period between 1919 and 1926 applicant operated on behalf of the United States Shipping Board a fleet of 43 tankers to all parts of the world. Between 1931 and 1933 a freight packet line was operated between New York and Philadelphia, Pa. This service was performed with barges propelled by a tug and a general line of commodities was carried."

The Report of Division 4, sheet 4, after making the aforesaid findings, correctly stated petitioner's contentions as follows:

"Applicant contends that the interruption of its service since 1930[1] was due to the lack of business because of economic depression, and later because all of its maritime equipment was, and is now, used in essential war work, which causes were beyond its control and must be considered under the mandate of section 309(a); that at various times during the years of depression its operation was limited to 1 and 2 tugs and a few inland

[1] It should be noted, however, that the Commission's reference to 1930 as the beginning of the interruption in petitioner's service consequent upon the economic depression is incorrect, since as the Commission's findings relative to petitioner's operation of a freight line from 1931 to 1933 between New York and Philadelphia make clear, the interruption began in 1933.

scows and lighters, and that there was no abandonment of its service."

The Commission did not make any findings contrary to the facts embodied in these contentions, but concluded that petitioner was "not in bona fide operation on January 1, 1940, and since" (Report, sheet 4), basing its conclusion solely upon the findings that follow:

> "The evidence of record establishes the fact that applicant for a period of over 10 years has performed only an inconsequential amount of transportation of a kind that is now subject to the act, and that it is not holding itself out at the present time to perform such transportation. Obviously, the remote operations heretofore described do not establish bona fide operations on January 1, 1940, and since. Furthermore, applicant has considerable facilities available at the present time, the use of which it voluntarily has confined to exempt transportation within the limits of New York Harbor. We affirm the conclusion of the prior report that applicant has not established that it is entitled to 'grandfather' rights."

Petitioner contends:

(1) That, conceding the paucity of its operations during the depression period from 1933 through 1939, petitioner did not abandon the service on which it predicates "grandfather" rights, but on the contrary bent every effort to obtain traffic for its largely idle fleet; hence that the interruption in service during that period was beyond petitioner's control within the meaning of the "grandfather" clause. The Commission, as we hereinafter point out, omitted findings on this critical aspect of the case, even though petitioner sharply called the omission to the Commission's attention in its petition for reconsideration addressed to the full Commission (Petition for Reconsideration, pp. 6, 7, 13, 14).

(2) That the employment of petitioner's entire fleet in essential war work from 1940 onward was likewise an interruption in service beyond petitioner's control.

Petitioner instituted a proceeding under the Urgent Deficiencies Act (28 U. S. C. 47) in the United States District Court for the Southern District of New York to set aside and annul the orders of the Interstate Commerce Commission, which denied its aforesaid application for a certificate. The United States of America and the Interstate Commerce Commission were duly made parties to that proceeding and filed their Answers to the Petition. A specially constituted District Court was convened pursuant to the Urgent Deficiencies Act and the cause was duly argued and briefed before that Court. On the 16th day of July, 1945, the District Court dismissed the petition for want of equity and adjudged that the orders of the Commission were in all respects valid.

Annexed is a copy of the Court's opinion. The final decree and judgment was entered in conformity with this opinion on August 9, 1945. The gist of the District Court's holding may be summarized as follows:

(1) The Court held that the Commission was warranted in denying the application because petitioner forfeited its "grandfather" rights when it deviated from its customary routes in order to devote its entire fleet to the performance of essential war work within the limits of New York Harbor, notwithstanding that such interruption was temporary in nature, was dictated by the exigencies of war time traffic demands, and was required in the public interest. In its opinion, the Court acknowledges that the Commission did not make definite findings as to whether the interruption in service before January 1, 1940, was or was not beyond petitioner's control, and conceded that a remand asking for

such findings would be appropriate if the Commission's determination depended solely upon that question.

Several important and novel questions concerning the meaning and proper application of Section 309(a) of the Interstate Commerce Act are presented to the Court on this appeal. We shall not enumerate these questions in detail inasmuch as they are clearly indicated by petitioner's Assignment of Errors. From the foregoing, however, it is clear that the dominant question will be whether dedication by petitioner of its entire fleet to the performance of essential war work within the limits of New York Harbor constituted an interruption in service as the term "interruption" is used in Section 309(a) of the Interstate Commerce Act, and whether, conceding that such question should be answered in the affirmative, the interruption was one within petitioner's control as the term "control" is used in the Act. It is contended that the questions presented to the Court on this appeal are substantial, that they are novel, and that their correct resolution is important in a proper administration of Part III of the Interstate Commerce Act. It need hardly be added that aside from these paramount considerations of public interest, the questions presented on this appeal are of vital concern to petitioner inasmuch as the result of the judgment sought to be reviewed is to place petitioner in the position where its entire investment may be in jeopardy since without the operating authority it seeks, there may be no possibility of putting its large fleet to profitable use when traffic returns to its normal channels.

Cf. *Gregg Cartage & Storage Company* v. *United States*, 316 U. S. 74, 87;
Matter of Carpenter, 32 M. C. C. 580.

The following decisions are believed to sustain the jurisdiction of the Supreme Court of the United States on a

direct appeal to review the final decree and judgment here in question:

Barrett Line, Inc. v. *United States of America*, 89 Law. Ed. Advance Opinions, Vol. 89-No. 17 (pp. 1405-1418).

Alton R. Co. v. *United States*, 315 U. S. 15.

Cornell Steamboat Co. v. *United States*, 321 U. S. 634.

Respectfully submitted,

MAURICE A. KRISEL,
ROMAN BECK,
Attorneys for Petitioner,
29 Broadway,
Borough of Manhattan,
New York, New York.

APPENDIX "A"

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil Number 27,352

Opinion

McAllister Lighterage Line, Inc., *Petitioner*,

against

United States of America

and

Interstate Commerce Commission, *Defendants*

Before: Chase, Circuit Judge; Coxe, Clancy, District Judges

Krisel & Beck for Petitioner.

Edward M. Reidy, for Interstate Commerce Commission; Edward Dumbauld, Special Assistant to Attorney General for United States; Wendell Berge, Assistant Attorney General; John F. X. McGohey, United States Attorney.

Chase, Circuit Judge:

McAllister Lighterage Line, Inc., and another who is no longer a party to this proceeding, brought this suit in the District Court for the Southern District of New York to set aside an order made by the Interstate Commerce Commission under Part III of the Interstate Commerce Act. It was heard by a court of three judges as required by the Provisions of the Deficiencies Appropriation Act (28 U. S. C. A. sec. 41 (28), 47). The order denied an application by the petitioner for a certificate under the so-called "grandfather" clause in Section 309 (a) of Part III of the act, 49 U. S. C. A. Sec. 909(a) authorizing it to continue certain operations as a common carrier by water, and in

the alternative for a certificate based on public convenience and necessity. The alternative ground is no longer relied on. This section, in so far as now material reads as follows:

> "Except as otherwise provided in this section and section 311, no common carrier by water shall engage in transportation subject to this part unless it holds a certificate of public convenience and necessity issued by the Commission; Provided, however, that, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in subsection (b) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. Pending determination of any such application, the continuance of such operation shall be lawful. * * *"

The application for a certificate was made within the time allowed by the above section and a preliminary report was made by an examiner for the Commission recommending its denial. Thereafter, reconsideration was requested and hearings were had before an examiner, who filed a report likewise recommending the denial of the application. The petitioner filed exceptions to that report which were overruled by Division IV of the Commission in a report and order denying the application. Following that the full commission reviewed the proceedings and entered

the order now under review which was made effective as of May 3, 1944.

There is no question as to the jurisdiction of this court and the issues are (1) whether the Commission made adequate findings to the effect that the admitted interruptions in the service the petitioner sought authority to continue were due to causes over which it and its predecessor had no control, and (2) if the findings are sufficient, whether they are supported by the evidence. A subsidiary question was raised as to the right of the petitioner to broaden its application by amendment at the hearing before the examiner, which will, however, require consideration only if the order is set aside in whole or in part.

The petitioner in its proposed amended application sought a certificate under the "grandfather" clause to continue operation as a common carrier by water from, to and between all ports from Eastport, Me., to North Carolina, over coastwise ocean routes and inland waterways, including Long Island Sound, Hudson River, Delaware and Chesapeake Canal, Delaware Bay, and intercoastal waterway, by tug, barge and general towage.

In the report of Division IV which was confirmed by the full Commission, the following appears, and so far as the findings go they are supported by adequate evidence.

> "On January 1, 1940, and since that time, McAllister Lighterage Line, Inc., has been engaged in general transportation by water within the limits of New York Harbor as determined by our order of March 26, 1941, in Ex Parte No. 140, *Determination of the Limits of New York Harbor and Harbors Contiguous thereto*. Applicant's services within this area have consisted of (1) transportation of various commodities for shippers and consignees, (2) the docking and undocking of vessels for other carriers, and (3) the furnishing of vessels under bare boat charters at per diem rates to the Pennsylvania Railroad Co.
>
> "The transportation performed for shippers and consignees between points within the above mentioned harbor area is exempted by section 303(g) (1) of the

act because it is not performed under common control, management or arrangement with other carriers for continuance through movement to or from a place beyond the limits of the area. The towage performed for other carriers in docking and undocking of vessels is incidental to the transportation by those carriers and applicant's operation is exempt under section 303(f) (2) to the extent that such transportation is subject to the act. In the furnishing of vessels under bare boat charters to the railroad, applicant is not a common or contract carrier as defined in sections 302(d) and (e) of the act.

"In 1939 applicant towed 2 derricks and a crane from and to points outside the above mentioned harbor area. During that year, and since, applicant engaged in no other transportation to or from points outside of the harbor area, except for the movement of 213 tons of steel piling from the Claremont, N. J. railroad terminal to Fire Island, N. Y. in November 1940. In April 1942, applicant towed derrick barges and salvor's equipment for a company engaged in salvage operations.

"The towage of the derricks and crane have been exempted from the requirements of Part III of the act by our order of October 29, 1941, in Ex Parte No. 147, *Towage of Floating Objects*. Towage for persons engaged in salvage operations would be incidental to their operations, and applicant's service in connection with such operations is exempted by section 303(g) (2). Therefore, the only transportation performed by applicant which would be subject to regulation under Part III of the act has occurred since January 1, 1940. Applicant must show that it has engaged in non-exempt operations on and before Jan. 1, 1940, as well as since that date, in order to be entitled to a permit. Under these circumstances, we must deny the request for authority to operate to and from points outside harbor area as defined in our order in Ex Parte No. 140.

"Applicant or its predecessors have been engaged in marine transportation since 1864, and the business has been continuously owned by its founder or his descendants through four generations. The corporate set up now consists of McAllister Bros. Inc. which charters all of its equipment to McAllister Lighterage Line Inc. the operating company. Both companies are mutually controlled. Applicant now owns or charters 101 units of floating equipment, including 16 tug boats ranging from 300 to 1,050 horse-power, 8 lighters, 4 derrick barges, 64 scows, 9 barges, 2 coastal tugs and 2 ocean-going barges of 2,500 ton capacity. The United States Government has requisitioned the two coastal tugs but has allocated to applicant two diesel powered tugs to be operated by it as agent for the government; one of these tugs is a coastal type. It is expected that other vessels will also be allocated to applicant under the same arrangement in the near future. At all time applicant has maintained at least one vessel licensed for coastal operations.

"Applicant's activities in the past have included ocean transportation, harbor towing, freighting, salvage, fishing, chartering, passenger excursions and managing or operating for other companies. A general barge and towing service was performed between Cuba, New Orleans, La., and other eastern parts in the period between 1900 and 1914; salvage operations were conducted between New York and Norfolk, Va., with trawlers in 1920, and a steamship was purchased in 1922 for ocean trading. In the period between 1919 and 1926, applicant operated on behalf of the United States Shipping Board a fleet of 43 tankers to all parts of the world. Between 1931 and 1933, a freight packet line was operated between New York and Philadelphia, Pa. This service was performed with barges propelled by a tug and a general line of commodities was carried.

"Since 1933 applicant's operations have been confined, primarily, to the New York Harbor area. Some

towing for other carriers and all bulk commodities have been performed from or to points outside of the harbor area but such operations are not subject to the act. In 1937 machinery, airplanes, guns and parts were carried between New York Harbor, Hudson River and Long Island Sound points but this service has not been repeated. Since January 1, 1940, applicant's fleet has been engaged almost exclusively within New York Harbor in the performance of lighterage and other work essential to the war effort. At the present time its commitments for service within the harbor are so great that it is unable to accept other traffic when offered.

"Applicant contends that the interruption of its service since 1930 was due to the lack of business because of the economic depression and later because all of its maritime equipment was, and is now, used in essential war work, which causes were beyond its control and must be considered under the mandate of section 309(a); that at various times during the years of depression its operation was limited to one or two tugs and a few inland scows and lighters, and that there was no abandonment of its service. Under the provisions of section 309(a) an applicant, in order to be entitled to 'grandfather' rights, must show that it was in bona fide operation on January 1, 1940, and continuously since, except for interruptions of service beyond its control. The evidence of record establishes the fact that applicant for a period of over ten years has performed only an inconsequential amount of transportation of a kind that is now subject to the act, and that it is not holding itself out at the present time to perform such transportation. Obviously the remote operations heretofore described do not establish bona fide operations on January 1, 1940, and since. Furthermore, applicant has considerable facilities available at the present time, the use of which it voluntarily has confined to exempt transportation within the limits of New York Harbor. We affirm the conclusion of the prior report that applicant

has not established that it is entitled to 'grandfather' rights."

As the Commission has found on adequately supporting evidence that the petitioner was not in bona fide operation on January 1, 1940, over the routes and between the ports as to which the application was made and has not so operated since that day, the petitioner can, and in fact does, now rely on its contention and proof that it and its predecessors in interest formerly were engaged in such operations and that it would have continued to be so engaged on and after the critical date but for interruptions of the kind which under the statute are not to be treated as a break in the continuity of the service. Their former engagement in service was established and so was the interruption from about 1930 onward except for slight and irregular operations before 1940. The commission's findings to that effect are not erroneous because exempt operations were disregarded. This is not a contract carrier application like that in The Barrett Line Inc. v. United States et al. 324 U. S. — (Dec'd June 18, 1945) where bona fide chartering, whether the charterer used the vessels exempt or non-exempt carriage, was held evidence of bona fide operation by the owner within the terms of the applicable statute.

It is true that the Commission did not make a definite finding that the interruption in service before January 1, 1940, either was or was not beyond the control of petitioner and its predecessors and if decision were wholly dependent upon the fact as to that matter the petitioner would have substantial ground for insisting that the cause be remanded to the Commission for a finding on that point. It is essential, as a corollary to the now well settled rule that facts found by an administrative agency on substantial evidence are to be given effect by the courts, that administrative agencies make clear cut findings on all material and controverted issues of fact, "The administrative process will best be vindicated by clarity in its exercise." Phelps Dodge Corp. v. National Labor Relations Board, 313 U. S. 177, 197. See also, Baltimore and Ohio R. Co. v. United States, 22 F. Supp. 533.

Decision, however, does not depend entirely upon what the petitioner or its predecessors did or failed to do on or before January 1, 1940. The statute requires as a condition precedent to the granting of a "grandfather" certificate, where proof is not made of bona fide operation on January 1, 1940, and since that date, a showing that the interruption of service on and after the critical date was for causes not within the control of the petitioner or its predecessors. There was no proof whatever of subsequent operation and the Commission found both that the applicant "is not holding itself out at the present time to perform such transportation" and that it "has considerable facilities available at the present time, the use of which it voluntarily has confined to exempt transportation within the limits of New York Harbor." This makes unimportant any deficiency in the findings as to the interruption of service before January 1, 1940. We think the Commission's findings above quoted necessarily imply that the petitioner's failure to resume the interrupted service after January 1, 1940, was not due to causes beyond its control. Its only excuse for failing to perform such service during the subsequent period is that after the outbreak of World War II all its facilities were required for service in New York Harbor and that after this country was attacked they would have been requisitioned by the government for such use had the petitioner not devoted them voluntarily to that purpose.

Whether or not that is so, however, is problematical, and the fact that the petitioner made no attempt to resume the service for which the "grandfather" certificate is now sought leaves in the realm of pure speculation what the effect of such an attempt might have been by way of any requisition by the government. We feel bound to give effect to the findings made by the Commission, and when that is done, the petitioner is left short of proof and findings necessary to entitle it to a reversal of the order denying its application for a certificate. The informed judgment of the Commission must be given effect when based on findings which are supported by the evidence. Mississippi Valley Barge Co. v. United States, 292 U. S. 282.

We adopt the findings made by the Commission as the findings of this Court. If this opinion is not believed to be a compliance with rule 52 F. R. C. P., the defendants may present proposed findings and conclusions together with their proposed decree.

HARRIE B. CHASE,
U. S. Circuit Judge.
ALFRED C. COXE,
U. S. District Judge.
JOHN W. CLANCY,
U. S. District Judge.

July 16, 1945.